JOG-LUK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 748

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,

vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HOWARD D. MOSES,
Counsel for Petitioner.

CHARLES G. CULVER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. .....

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,

vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jogger Manufacturing Corporation, petitioner, prays that a Writ of Certiorari issue to review the order of the United States Circuit Court of Appeals for the Seventh Circuit, entered December 1, 1943 (Supp. Rec. 131).

In accordance with Rule 38 of the rules of this court, a certified transcript of the original record and supplemental record in the case, including the proceedings in the Circuit Court of Appeals is furnished herewith.

Summary Statement of the Matter Involved.

Petitioner originally instituted suit for infringement of its Letters Patent No. 1694638 and 1863465, issued upon a

paper stacking device known as a jogger. The defendant, respondent here, defended upon the ground of a license granted the American Multigraph Company, August 10, 1931, and also that the accused device did not infringe petitioner's patents. Trial was had in the United States District Court for the Northern District of Illinois, Eastern Division. Validity of the patents was not contested.

The trial court ruled that the license contract (Rec. 191-4, Rec. 56) was clear and unambiguous and licensed the manufacture of only two sizes of petitioner's device specifically mentioned in the contract (Rec. 205); a decree finding infringement and awarding petitioner an injunction and accounting of profits and damages was thereafter entered (Rec. 214).

Respondent in his Designation of Record included defendant's exhibits 8, 9, 10 and 11 (Rec. 223). Thereafter former counsel for petitioner stipulated to delete these exhibits from the record on appeal. These exhibits are blue prints of the No. 112 and No. 1121 joggers licensed to American Multigraph Company (Orig. Rec. 147, Supp. Rec. 90-91, 120-123).

On appeal, the United States Circuit Court of Appeals, Seventh Circuit, ruled that the aforementioned license agreement licensed American Multigraph Company and its successor to make, use and sell any sized jogger it saw fit to apply to any device it might make. That court also found that certain features of the accused device were not infringements of petitioner's patents. The decree of the District Court was reversed with directions to dismiss the suit (118 Fed. 2nd 867).

The decision of the Circuit Court of Appeals was rendered March 6, 1941, and rehearing denied April 14, 1941. Petition for Writ of Certiorari was filed in this court to the October 1940 Term, and said petition was denied October 13, 1941. The mandate was filed in the District Court on July 18, 1942.

On December 3, 1942, petitioner made application to the Circuit Court of Appeals, Seventh Circuit, for permission to apply to the District Court for leave to file a Bill of Review upon the ground of newly discovered evidence and also upon the ground of perjury committed by the defendant's witnesses upon matters material to the issues in the case (Supp. Rec. 2-27). Petitioner's application was denied February 3, 1943 (Supp. Rec. 50), and a motion to vacate said order was denied on the 15th day of February, 1943 (Supp. Rec. 55).

On the 6th day of August, 1943, petitioner filed its Amended Petition for permission to make application to the United States District Court for leave to file a Bill in the nature of a Bill of Review. The original petition was made a part of the Amended Petition by reference and was predicated upon a proposed complaint, sworn to, and attached to the petition as a part thereof (Supp. Rec. 57-123).

The grounds upon which relief was sought in the proposed complaint were:

1. That the Circuit Court of Appeals based its opinion upon a misapprehension of the facts; and that there was in existence a series of correspondence and other documentary evidence which completely refuted all findings of fact made by the United States Circuit Court of Appeals.

2. That said evidence was in the possession of petitioner's former counsel; that said counsel refused to advise the Circuit Court of Appeals of its existence after the rendition of its original decision on March 6, 1941 (Supp. Rec. 101).

3. That unknown to petitioner, said former counsel had stipulated to delete from the record exhibits which would have proven the findings of fact indulged in by the United States Circuit Court of Appeals to be without foundation in fact since said exhibits would have estopped respondent

from asserting certain differentiating elements in the accused devices as being outside of the claims of petitioner's patents (Supp. Rec. 90-91).

4. That the deletions of the record and the refusal of counsel to present the suppressed evidence as requested were a fraud upon the rights of petitioner and a fraud upon the court.

5. That petitioner did not recover back the withheld documentary evidence until the Spring of 1942; that other counsel was immediately retained and after an exhaustive investigation covering several months, application was made to the United States Circuit Court of Appeals; that the petitioner had been diligent at all times in an effort to protect its interests (Supp. Rec. 102).

6. That the import of the withheld evidence was to prove conclusively that the previous decision of the Circuit Court of Appeals was not founded on the facts. Its further import was to estop the respondent from asserting the alleged differentiating elements upon the ground that each of the alleged differentiating elements were embodied in the joggers numbered 112 and 1121 by petitioner before and at the time of the execution of the license contract of August 10, 1931, and were within the contemplation of the parties at the time of the execution of said license contract.

The United States Circuit Court of Appeals denied the prayer of petitioner's Amended Petition for permission to make application to the District Court for leave to file a Bill of Review on December 1, 1943, without rendering an opinion in support of its order (Supp. Rec. 131).

Jurisdiction.

1. Consideration of this matter is vested in this court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (8 F.C.A., Title 28, Section 347).

2. The date of the order which petitioner seeks to review is December 1, 1943 (Supp. Rec. 131).

3. This Petition for a Writ of Certiorari is presented to this court within three months from December 1, 1943, as prescribed by Section 8 of the Act of February 13, 1925 (8 F.C.A., Title 28, Section 350).

We believe the action of the United States Circuit Court of Appeals, Seventh Circuit, to be in conflict with *Levy* v. *Arredondo,* 12 Pet. 218, 9 L. Ed. 1062; *U. S.* v. *Throckmorton,* 98 U. S. 61; 25 L. Ed. 93; *Ballard* v. *Searls,* 130 U. S. 50, 9 S. Ct. 418, 32 L. Ed. 846; *Marshall* v. *Holmes,* 141 U. S. 590, 12 S. Ct. 62, 35 L. Ed. 870; *Ransom* v. *City of Pierre,* 101 Fed. 665.

4. The original suit was instituted for infringement of petitioner's Letters Patent. The order of the Circuit Court of Appeals entered December 1, 1943, completely and finally disposes of any rights remaining to petitioner to seek redress. The finality of the order is of such character as to be cognizable by this court.

Question Presented.

When it is brought to the attention of a Circuit Court of Appeals that a gross miscarriage of justice has been perpetrated by its previous decision which was based upon a misapprehension of the facts and a misuse by that court of its right to construe a contract, which by the very nature of its interpretation is rendered ambiguous, and further that the true facts had been withheld from the court by the unauthorized, wilful and fraudulent conduct of the aggrieved party's former counsel, is it an abuse of discretion for the Circuit Court of Appeals to deny permission to the aggrieved party to make application to the District Court for leave to file a Bill in the nature of a Bill of Review for the purpose of introducing into the record the suppressed evidence?

Reason Relied On for Allowance of the Writ.

The deliberate disregard of the fundamental legal principles applicable to the construction of ambiguous contracts, and the refusal by the Circuit Court of Appeals to subsequently allow fraudulently suppressed evidence to become a part of the record to aid in the construction of the contract in question is such an unfair and prejudicial departure from the accepted and usual course of judicial proceedings, and in such complete disregard of established law by that court as to demand the exercise of the supervisory power of this court.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

JOGGER MANUFACTURING CORPORATION

By HOWARD D. MOSES and CHARLES G. CULVER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, delivered orally December 29, 1939, appears in the record at pages 205-9. It was not reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in the record at pages 442-8 and in the official Federal Reporter in 118 Fed. 2nd 867.

Jurisdiction.

In the interest of brevity, the subject having been covered in the Petition for Writ of Certiorari, *supra,* pages 4-5, we refer the court to that statement.

Statement of the Case.

To dispense with the necessity of repeating here the essential facts and issues, we hereby adopt that statement contained in the Petition for Writ of Certiorari.

Specification of Errors.

The errors which petitioner will urge if the Writ of Certiorari herein prayed is granted are that the Circuit Court of Appeals for the Seventh Circuit erred:

1. By construing the license contract of August 10, 1931, in a manner which, by its very nature, evidenced its ambiguity without all the facts and circumstances surrounding the execution of the document to aid in its construction.

2. By denying petitioner's Petition for permission to make application to the District Court for leave to file a

Bill in the nature of a Bill of Review, the substance of which (a) called to the court's attention the error of its previous decision, and (b) showed the court for the first time the fact that there was in existence evidence which it should have had before it before attempting to construe the contract, and which had been withheld from the record by way of Petition for Rehearing by the unauthorized, wilful and fraudulent disregard of the rights of petitioner, by petitioner's former counsel, and (c) that there was no factual foundation in truth for the findings upon which the Circuit Court of Appeals based its previous decision.

Summary of Argument.

Petitioner's "Reason Relied on for Allowance of Writ," set forth in the Petition for Writ of Certiorari, (*supra*, page 6) is hereby adopted as a summary of its argument.

ARGUMENT.

Point I.

THE DELIBERATE DISREGARD OF THE FUNDAMENTAL LEGAL PRINCIPLES APPLICABLE TO THE CONSTRUCTION OF AMBIGUOUS CONTRACTS, AND THE REFUSAL BY THE CIRCUIT COURT OF APPEALS TO SUBSEQUENTLY ALLOW FRAUDULENTLY SUPPRESSED EVIDENCE TO BECOME A PART OF THE RECORD TO AID IN THE CONSTRUCTION OF THE CONTRACT IN QUESTION IS SUCH AN UNFAIR AND PREJUDICIAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND IN SUCH COMPLETE DISREGARD OF ESTABLISHED LAW BY THAT COURT AS TO DEMAND THE EXERCISE OF THE SUPERVISORY POWER OF THIS COURT TO PREVENT A GROSS MISCARRIAGE OF JUSTICE.

The following prefatory statements of law, while not controlling the main point, are indispensable to a full appreciation of the main issues involved in the Petition for Writ of Certiorari.

The trial court ruled that the license contract of August 10, 1931, was not ambiguous and that parol evidence was not necessary to aid in determining the intention of the parties (Rec. 205). Upon appeal, the Circuit Court of Appeals undertook to construe the contract in a manner diametrically opposed to the construction placed upon it by the trial court (118 Fed. 2nd 867). There had been no opportunity for petitioner to introduce evidence of the facts and circumstances surrounding the execution of the contract, since the trial court ruled the contract unambiguous. The Circuit Court of Appeals used what evidence respondent had offered, over objection of petitioner (Rec. 66), to arrive at its decision.

As a result, there stands upon the record of this case, a decision arrived at by unlawful means, and a construction of the license contract utterly foreign to the intent of the parties to the contract.

Point I-A. When two courts hold to opposite views in an attempt to construe a written instrument, the language out of which such difference of opinion arises is ambiguous.

The ambiguity of the license contract was established when the Circuit Court of Appeals attempted to place a construction upon the contract inconsistent with that of the trial court. In the case of *Lock Joint Pipe Co.* v. *Melber,* 234 Fed. 319, at page 323, that court said:

> "It is urged by the defendants that the reservation clause of the assignment is so clear in expression that it is susceptible of but one construction, which is the construction placed upon it by the defendants, and that its language is wholly without ambiguity and raises no question whatever. To this view was the learned trial judge so clearly inclined that he dismissed the bill without hearing the defendant and without leaving the bench. Yet, if the case had originally been submitted to us, we feel that we would have been equally prompt in deciding it the other way. Obviously, therefore, the language does raise a question. Every question has two sides. In some, one side is so prominent according as it is viewed, that it obscures the other. Curiously enough, the question in this case must be of that kind, for when two courts hold so clearly to opposite views there must be a question with two distinct sides, and the language out of which such a question arises must be ambiguous indeed."

In the case of *Thompson* v. *Akin,* 81 Ill. App. 62, ambiguity is defined as follows:

"A statute or any sentence, clause or word is 'ambiguous' when it is capable of being understood by reasonably well-informed persons in either of two or more ways."

Point I-B. By reason of the doubt arising as to the true sense and meaning of the words employed, the sense and meaning of the language will be investigated and ascertained by evidence dehors the instrument, and the court in order to place itself as nearly as possible in the situation of the parties at the time will consider all the facts and circumstances leading up to and attending the execution of the contract.

The ambiguity of the contract having been established by the opposed construction of the two courts, the Circuit Court of Appeals should have remanded the case for introduction into evidence all the facts and circumstances leading up to and attending the execution of the contract. In no other way could that court be able to place itself "as nearly as possible in the situation of the parties at the time" as required by an unbroken line of State and Federal decisions.

The reason for this is obvious, for if a contract is unambiguous, its construction is a question of law and extrinsic evidence is not admissible to explain or vary the expressed terms of the instrument. However, where the contract is capable of more than one interpretation, it is ambiguous and before the court can confidently say what the intent of the parties was, it must be in possession of all of the facts in order that the language used may be construed in the light of the situation of the parties at the time that language was employed. In a very old Illinois case, *Doyle, et al.*, v. *Teas, et al.*, 4 Scammon 202, we quote from page 256:

"Where the language is of such a character as to show that the parties had a fixed and definite meaning

which they intended to express, and used language adequate to convey that idea to persons possessed of all of the facts which they had in view at the time they used the language, it then becomes the duty of the court to remember those facts, if need be, by parol proof, and thus, as far as possible, by occupying the place of the parties employing the expressions, ascertain the sense in which they were intended to be used."

The following authorities support the expression of the Supreme Court of Illinois in the *Doyle* v. *Teas* case above cited:

Hayes v. *O'Brien,* 149 Ill. 403.
Close v. *Browne,* 230 Ill. 228.
Hedrick v. *Donovan,* 248 Ill. 479.
Higinbotham v. *Blair,* 308 Ill. 568.
Weber v. *Adler,* 311 Ill. 547.
Nelson v. *Colgrove & Co. State Bank,* 354 Ill. 408.
Board of Education v. *City of Rockford,* 373 Ill. 442.
Marx v. *American Malting Co.,* 169 Fed. 582.
Ryan v. *Ohmer,* 244 Fed. 31.
General Supply Co. v. *Marden, Orth & Hastings Co.,* 276 Fed. 786.
Corbett v. *Winston Elkhorn Coal Co.,* 296 Fed. 577.

We submit that it was error for the Circuit Court of Appeals to presume to undertake construction of the license contract without the aid of extrinsic evidence with both sides being given an opportunity to offer proof.

However, the merits of this Petition do not rest upon this error previously committed by the Circuit Court of Appeals, but rather upon an abuse of discretion indulged in by the Circuit Court of Appeals after considering the merits of the proposed complaint attached to petitioner's

Amended Petition. It is in the light of the suppressed evidence, after being called to its attention, that the previous actions of the Circuit Court of Appeals measure the abuse of discretion complained of in this Petition for Writ of Certiorari.

Point I-C. The Circuit Court of Appeals, having predicated its decision upon a misapprehension of the true facts, there was imposed upon petitioner's former counsel the duty to advise that court of the existence of the evidence which would destroy the court's misapprehension of the truth, and the suppression of the truth by petitioner's former counsel was as reprehensible as the utterance of the false.

It is a lawyer's duty to the court to aid in the ascertainment of the truth in order that justice may be done between the parties.

United States v. *Newman, et al.*, 25 Fed. 2nd 357.
People v. *Chamberlain*, 242 Ill. 260.
People v. *Payson*, 215 Ill. 476.
People v. *Moutray*, 166 Ill. 360.
People v. *Case*, 241 Ill. 279.

A fair statement of the general rule pertinent to the suppression of truth constituting a falsehood is contained in the case of *Copper Process Co.* v. *Chicago Bonding & Insurance Co.*, 262 Fed. 66, wherein it is stated at page 73:

> "Fraud may be committed by suppression of the truth as well as by the suggestion of falsehood. 12 R.C.L. 305, and cases. But the law distinguishes between passive concealment and active concealment, the distinction being that in active concealment there is employed a purpose or design. As a general rule, to constitute fraud by concealment or suppression of the truth, there must be something more than mere silence or a mere failure to disclose known facts. There must be some occasion or some circumstance which

imposes on one person the legal duty to speak, in order that another dealing with him may be placed on an equal footing. Then a failure to state a material fact is equivalent to concealment of the fact and amounts to fraud equally with an affirmative falsehood. Citing cases."

Concurring in this statement of the law also is *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383, and *Tyler* v. *Savage*, 143 U. S. 79.

Point I-D. The petitioner having been prevented from presenting all of its case to the court by fraud practiced upon it, the Circuit Court of Appeals abused its discretion by denying petitioner's petition for permission to make application to the District Court for leave to file a bill in the nature of a bill of review.

The test of the sufficiency of the circumstances for which a court of equity will grant relief from a judgment are recognized and stated in the case of *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. At page 65, the court said:

"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree

and open the case for a new and a fair hearing. See, Wells, *Res Adjudicata,* sec. 499; *Pearce* v. *Olney,* 20 Conn. 544; *Wierich* v. *De Zoya,* 7 Ill. (2 Gilm.) 385; *Kent* v. *Ricards,* 3 Md. Ch. 396; *Smith* v. *Lowry,* 1 Johns. Ch. 320; *De Louis* v. *Meek,* 2 Green (Iowa) 55.

In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

Concurrence in that statement may be found in the following cases:

Truly v. *Wanzer,* 5 How. 141.
Vance v. *Burbank,* 101 U.S. 514.
Pacific RR. of Missouri v. *Missouri Pacific RR. Co.,* 110 U.S. 504.
Marshall v. *Holmes,* 141 U.S. 588.
Hatch v. *Ferguson,* 57 Fed. 966.
Miller v. *Perris Irrigation District,* 85 Fed. 693.
Deweese v. *Smith,* 106 Fed. 438.
King v. *McAndrews,* 111 Fed. 860.
LeMarchel v. *Teagarden,* 152 Fed. 662.
Nelson v. *Meehan,* 155 Fed. 1.
Riverside Oil and Refining Co. v. *Dudley,* 33 Fed. 2nd 749.
Fiske, et al. v. *Buder,* 125 Fed. 2nd 841.

Discussing the nature of the fraud recognized as a ground for relief, the Circuit Court of Appeals said in the case of *Fiske, et al.* v. *Buder,* 125 Fed. 2nd 841, at page 849:

"Fraud which prevents a person from presenting an available defense is proper ground for relief against a judgment. Footnote 12, 31 Am. Jr. Article 654, page 232. If the fraud really prevents the complaining party from making a full and fair defense it will jus-

tify setting aside a decree, whether extrinsic or intrinsic."

It must also be borne in mind that the proposed complaint alleges that after the rendition of the decree of the Circuit Court of Appeals on March 6, 1941, petitioner requested its former counsel to make the evidence in that counsel's possession available to the court to prove the error of its decision. This, said former counsel refused to do. After this refusal, petitioner went to the chambers of the United States Circuit Court of Appeals and the Honorable Evan A. Evans of that court agreed to grant an audience to petitioner and its counsel and respondent and his counsel, but that petitioner's counsel refused to attend such a conference (Supp. Rec. 101).

Point I-E. The petitioner has not been guilty of laches in asserting its rights.

The respondent, Roquemore, and the Addressograph-Multigraph Corporation continue to manufacture and sell joggers embodying plaintiff's patents, in violation of the intention of the parties at the time of the execution of the license contract on August 10, 1931, so that there has been no detriment or alteration in the situation of the parties of which the respondent may complain.

Laches is not measured by lapse of time, but a change of situation during neglectful repose, rendering it inequitable to afford relief. (*O'Brien* v. *Wheelock*, 184 U.S. 450)

In the case of *Des Moines Terminal Co.* v. *Des Moines Ry. Co.*, 52 Fed 2nd 616, at page 630, it is said:

> "Laches is an inexcusable delay in asserting rights. Mere lapse of time does not constitute laches. To wait an unreasonable time before seeking relief from a known wrong may amount to laches. It is to be determined by consideration of justice, and that is dependent upon the circumstances of each particular case."

Point I-F. It is within the power of this court to direct the remandment of this case to the Circuit Court of Appeals with directions to grant permission to petitioner to make application to the District Court for leave to file the proposed bill in the nature of a bill of review.

It is within the supervisory and discretionary power of this court to direct the remandment of this case for the purpose of granting to petitioner leave to file the proposed complaint.

In the case of *Levy* v. *Arredondo,* 12 Pet. 218, 9 L. Ed. 1062, action was instituted for breach of certain contracts. There was diversity of view among the Justices of the Supreme Court as to the possible effect of these contracts, and it was directed that the cause be remanded with directions that the contracts be produced and evidence given of the contents of them. The basis of this action was that "this court have not sufficient materials before them whereon to found any final and satisfactory decree; and that justice recognizes that the cause should be opened in the court below for further proofs." (p. 219)

In the case of *Ballard* v. *Searls,* 130 U.S. 50, 9 S. Ct. 418, 32 L. Ed. 846, the entire proceeding was remanded because of a change in conditions subsequent to the trial. That rule was confined to instances in which "new matter discovered could not be evidence in any matter at issue in the original cause, and yet clearly demonstrated error in the decree." It should be noted the similarity of the case before this court on petition that the new matter could not have been evidence in the trial court since that tribunal ruled that the contract of August 10, 1931, was not ambiguous and evidence of the character now sought to be introduced was, therefore, not admissible.

In the case of *Marshall* v. *Holmes,* 141 U.S. 589, 35 L. Ed. 870, at page 596, the court said:

> "While as a general rule a defense cannot be set up in equity which has been fairly and justly tried at

> law, and although in view of the large powers now exercised by courts of law under their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is a settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or neglect in himself or his agents, will justify an application to a court of chancery.' Citing cases."

Reduced to its simplest terms, if the Circuit Court of Appeals had followed the law in the first instance, and had ruled that it did not understand the license agreement as the trial court had interpreted it, and that, therefore, all available evidence surrounding the circumstances and situation of the parties at the time the agreement was executed should be in evidence, the ultimate state of the facts would be:

(a) That no third sized jogger was made by petitioner for American Multigraph Company, petitioner's 1121 jogger being the size used upon the #57 press. (Supp. Rec. 89-90).

(b) The parties never intended that any sizes might be used or sold by the American Multigraph Company except the No. 112 and 1121 joggers. (Supp. Rec. 92-93).

(c) The No. 112 jogger and the M-24 jogger were of identical dimensions except for the height of the unpatentable frame of both. (Supp. Rec. 90-91).

(d) Petitioner never sold or intended to sell out its business to American Multigraph Company by the execution of the license contract of August 10, 1931. (Supp. Rec. 92).

(e) Petitioner had no knowledge of infringements until 1936; that the matter was immediately placed in the hands of counsel; that negotiations for settlement extended through 1936 until institution of suit in 1939. (Supp. Rec. 99-100).

(f) Respondent would be estopped to assert the differentiating elements claimed for the accused device. The alleged differentiating features of the accused device were first perfected and made a part of the No. 112 and 1121 joggers by petitioner, and were a part of the No. 112 and No. 1121 joggers when the license contract of August 10, 1931, was executed. (Supp. Rec. 96-99).

(g) Defendant's exhibits 8, 9, 10 and 11 which were deleted by stipulation of petitioner's former counsel show conclusively that the alleged departure in the actuating assembly on the accused device is identical with and incorporated on the deleted blueprints; that, therefore, the alleged fatal difference in the actuating assembly is the identical actuating assembly that petitioner licensed the American Multigraph Company to manufacture by the license contract of August 10, 1931. (Orig. Rec. 147, Supp. Rec. 82-83, 90-91).

(h) The only difference between models 112 and 1121 of petitioner's joggers licensed to American Multigraph Company was a difference in size. (Orig. Rec. 76).

If this court will compare the foregoing statements with the findings of fact upon which the original decision of the Circuit Court of Appeals was predicated, it will be seen that every finding of fact material to the conclusion arrived at by the Circuit Court of Appeals is met and refuted by the suppressed evidence.

Nor are the hands of a court of equity tied to prevent such a miscarriage of justice. The circumstances of this case are so demanding of the relief of a court of equity that the defendant, certainly not having been hurt by

delay, will not be heard to obstruct the efforts of plaintiff-petitioner to have justice done in this case. It was very properly stated in the case of *Kershaw, et al.* v. *Julien,* 72 Fed. 2nd 528, at page 530:

> "But, counsel argue, rigid rules of law intervene to prevent the righting of this wrong. If true, it is a grave reproach to our jurisprudence. But it is not true; rules of law are not as inflexible as counsel assert; if the decided cases afford no precedent for the redress of the wrong here perpetrated, then a precedent should now be established. The genius of the common law is its flexibility, a virtue arising from the determination of the courts of long ago that justice should be done."

CONCLUSION.

The hands of this court are not tied to rectify these abuses complained of herein. The fact that the former decree is cloaked with the dignity of a final judgment of the court below does not purge it of the fact that it is based upon a misapprehension of the law and facts, the true facts fraudulently kept from the court crying the injustice of the result.

We do not understand our system of jurisprudence to be so steeped in canons of procedure that the purpose of its existence is forgotten.

We respectfully submit that the petitioner, having been prevented from presenting all of its evidence by the unexplained and incomprehensible conduct of its former counsel, should be given that opportunity so that the ultimate decision may reflect the truth and a proper application of legal principles thereto.

For all of the foregoing reasons, and by virtue of the wealth of authorities herein cited, we respectfully submit that the denial of petitioner's request for permission to make application to the United States District Court for the Northern District of Illinois, Eastern Division, for leave to file the proposed Bill in the nature of a Bill of Review was an abuse of discretion by the United States Circuit Court of Appeals, Seventh Circuit, and the Writ of Certiorari herein prayed should be granted.

Respectfully submitted,

HOWARD D. MOSES AND
CHARLES G. CULVER,
Attorneys for Petitioner.

Motion for leave to use the certified transcript of record in Case No. 90, October Term 1940, of this court, in lieu of supplying an additional certified transcript of proceedings to that date.

Petitioner, Jogger Manufacturing Corporation, respectfully prays that an order be entered in this proceeding granting permission to petitioner to use the certified transcript of record heretofore filed in this court in case No. 90, October Term 1940, entitled *Jogger Manufacturing Corporation* v. *Wendell H. Roquemore, doing business as Multigraph Sales Agency,* in lieu of supplying a new certified transcript of record of proceedings covered by said certified transcript, and that the printing thereof be dispensed with pending consideration of the foregoing Petition for Certiorari herewith presented.

HOWARD D. MOSES,
Attorney for Petitioner.

CHARLES G. CULVER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 748

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff.

vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

MOTION OF PETITIONER FOR LEAVE TO FILE THE AFFIDAVITS OF E. F. KOENIG AND W. C. DUNLAP AND TO HAVE SAID AFFIDAVITS CONSIDERED IN CONJUNCTION WITH THE RECORD HEREIN.

HOWARD D. MOSES,
Counsel for Petitioner.

CHARLES G. CULVER,
Of Counsel.

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WENDELL H. ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

MOTION OF PETITIONER FOR LEAVE TO FILE THE AFFIDAVITS OF E. F. KOENIG AND W. C. DUNLAP AND TO HAVE SAID AFFIDAVITS CONSIDERED IN CONJUNCTION WITH THE RECORD HEREIN.

Now comes the petitioner, Jogger Manufacturing Corporation, by Howard D. Moses and Charles G. Culver, its attorneys, and moves the court to grant to the petitioner leave to make the affidavits of Ernest F. Koenig and W. C. Dunlap, marked exhibits T and U respectively, a part of, and be considered in conjunction with the Amended Petition For Permission To Make Application To The District Court For Leave To File a Bill in the Nature of a Bill of Review. As grounds for the granting of said Motion, petitioner attaches the affidavit of Howard D. Moses, and further attaches to the signed copy of this Motion, photostatic copies of the affidavits of Ernest F. Koenig and W. C. Dunlap.

HOWARD D. MOSES and CHARLES G. CULVER,
Attorneys for Petitioner.

STATE OF ILLINOIS }
COUNTY OF COOK } ss

Howard D. Moses, being first duly sworn on oath deposes and says that he is a licensed and practicing attorney in and for the State of Illinois, and duly licensed to practice before the Supreme Court of the United States; that he makes this affidavit in support of the motion filed on behalf of the petitioner in the foregoing proceeding.

Affiant further says that ever since the removal of petitioner's files from the possession of petitioner's former counsel, petitioner and its counsel have made exhaustive efforts to secure evidence of just such character as the affidavits of Ernest F. Koenig and W. C. Dunlap; that it has been impossible for petitioner to secure such evidence before the dates appearing upon the respective affidavits; that because of the inability of the petitioner to secure said affidavits at an earlier date, it was impossible to incorporate said affidavits as a part of the Amended Petition heretofore presented to the United States Circuit Court of Appeals, Seventh Circuit.

Affiant further says that the character of the matters sworn to by Ernest F. Koenig and W. C. Dunlap so conclusively prove the misapprehension of the true facts by the United States Circuit Court of Appeals, Seventh Circuit, and so convincingly corroborate petitioner's position in this matter, that in the opinion of this affiant said affidavits should be considered in conjunction with the proceeding now before this court.

HOWARD D. MOSES.

Subscribed and sworn to before me this
28th day of March, A. D. 1944.

FRANCES DOMSCHKE,
Notary Public.

(Notarial Seal)

AFFIDAVIT.

STATE OF OHIO }
COUNTY OF CUYAHOGA } ss:

I, E. F. Koenig, of the City of Cleveland, County of Cuyahoga, State of Ohio, Depose and Say:

That I was Treasurer of the Multigraph Company and carried on the principal negotiations with the Jogger Mfg. Co. through its President, R. W. Borrowdale, for the License to manufacture the two sizes of Joggers the Jogger Mfg. Co., was then manufacturing for us; namely, Model #112 and Model #1121 built expressly for our 11 inch #66 Multigraph and our 17 inch #86 Multigraph, respectively.

At Borrowdale's plant in Chicago on February 13, 1931, we discussed the sale of the Patents outright for $50,000.00 and the alternative, exclusive license to the office appliance field for $25,000.00, and also the license to manufacture and sell just the two sizes of Joggers; namely, #112 and #1121, then being manufactured for us by Borrowdale's Company. We discussed the M-24 and the Multicolor Type Presses, and since the Jogger #112 built for the 11 inch #66 Multigraph would fit either the M-24 or the Multicolor type presses, the Joggers #112 and #1121 were to be excluded from the manufacture and use on the #M24 and Multicolor Presses.

In Oct. 1930 my Company and the Addressograph Company of Chicago merged. Prior to the merger the Addressograph Company was manufacturing and selling the M24 and Multicolor Presses. After the merger the New Company, The Addressograph-Multigraph Company continued to manufacture and sell the M24 and Multicolor presses, which later was classified as the 5400 Dupligraph, and still later classified as the 1600 Multigraph Press.

At the time of signing the agreement of August 10, 1931 we did not object to excluding said two sizes of Joggers from use on the M-24 and Multicolor presses, but we did intend to use the said two sizes of Joggers, the 11 inch #112 and 17 inch #1121 for any other Multigraph and Dupligraph equipment we were building or would build in the future that these two specific size Joggers might fit. It was my understanding if additional size Joggers were to be manufactured and sold by us for other equipment manufactured by us from time to time, a new agreement would be entered into between ourselves and the Jogger Company to purchase the right to manufacture and sell such additional size Joggers.

Further Deponent Sayeth Not.

(Signed) E. F. KOENIG

(Notarial Seal)

Subscribed and Sworn to before me this 25th day of January, A. D. 1944 at Cleveland, Ohio.

Margaret E. Evans (Signed)
Notary Margaret E. Evans, Notary Public

My commission expires Mar. 25, 1945.

STATE OF OHIO }
COUNTY OF CUYAHOGA } ss:

I, W. C. Dunlap, of the City of Cleveland Heights, County of Cuyahoga and State of Ohio, being first duly sworn on oath depose and say:

During 1930 and 1931, I was an officer of the American Multigraph Company of Cleveland, Ohio. This company merged with the Addressograph Company of Chicago in October, 1930. I am familiar with the negotiations leading up to the execution of the license contract of August 10, 1931, between Jogger Manufacturing Company of Chicago, of which Russell W. Borrowdale was president, and the American Multigraph Company.

At the time of negotiations between American Multigraph Company and Jogger Manufacturing Company, we were interested in the manufacturing and sales rights on Borrowdale's No. 112 and No. 1121 joggers for use on Multigraph's No. 66 and No. 86 presses. The No. 112 jogger could be used upon the M-24 and multicolor presses, manufactured by Addressograph Company prior to its merger with American Multigraph Company; and since Borrowdale was not interested in licensing use of the No. 112 jogger on the M-24 or multicolor presses, unless American Multigraph Company paid an additional consideration, final conclusion of negotiations was delayed several months.

It was finally verbally agreed that American Multigraph Company was to have an exclusive license to make and sell the two sizes of Borrowdale's joggers known as Models No. 112 and No. 1121, which he had been manufacturing for American Multigraph Company for some time before. Our understanding was that American Multigraph Company be permitted to use these two sizes on any of its equipment it desired, except the M-24 and multicolor presses. Further, that if additional sized joggers were required by

American Multigraph Company that a new license would necessarily be required from the Jogger Manufacturing Company to cover such other required sizes. The foregoing verbal understanding was then reduced to writing as expressed in the license contract of August 10, 1931.

At the time of the execution of the contract on August 10, 1931, it was not the understanding of the officers of American Multigraph Company or of Jogger Manufacturing Company that American Multigraph Company could manufacture any other sized jogger embodying Borrowdale's patents; that the only devices discussed and embodied in the license contract of August 10, 1931, were the specific joggers known as model No. 112 and model No. 1121.

Further deponent sayeth not.

(Signed) W. C. DUNLAP

(Notarial Seal)

Subscribed and sworn to before me this 3rd day of March, A. D. 1944, at Cleveland, Ohio.

Margaret E. Evans,
Notary Public
Margaret E. Evans, Notary Public

My Commission expires March 25, 1945

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 748

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,

vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

PHILIP M. AITKEN,
Counsel for Respondent.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX.

Cases Cited.

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Respondent-Defendant.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The respondent operated a business in Chicago which he called the Multigraph Sales Agency and in which business he sold Multigraph and Multilith machines and supplies (Orig. Rec. 85).* The petitioner sued the respondent for alleged patent infringement arising from the sale by respondent of a jogger which had been manufactured by the American Multigraph Company or its successors, Addressograph-Multigraph Corporation (Orig. Rec. 85-86). The jogger was sold by respondent for attachment to a Multi-

* Where we refer to "Orig. Rec." this refers to the record filed by Petitioner in connection with its petition for certiorari to this Court which was denied October 13, 1941.

lith Machine manufactured by the Addressograph-Multigraph Corporation.

The record shows that the Addressograph-Multigraph Corporation first started to manufacture these alleged infringing machines in the fall of 1931 (Orig. Rec. 95) and that the petitioner knew of this fact at least by 1936 (Orig. Rec. 142, 143), but petitioner did not institute this action until 1939 (Orig. Rec. 2).

During the time petitioner was represented by his first attorneys, Thorley von Holst and Robert W. Poore of the firm of Ames, Thiess, Olson & Mecklenburger of Chicago, Illinois (Orig. Rec. 4), the following occurred:

(1) Decree was entered in the District Court in favor of petitioner on January 24, 1940 (Orig. Rec. 214).

(2) The Circuit Court of Appeals for the Seventh Circuit, after consideration of written briefs and oral argument, reversed the District Court's decree on March 6, 1941 (Orig. Rec. 449—118 F. (2d) 867) on two grounds, and held that the machine charged to infringe—

(a) did not infringe either of plaintiff's patents asserted; and

(b) that the license agreement between petitioner and the manufacturer permitted the manufacturer to make this machine and did not prevent respondent from selling it.

(3) Petitioner filed motion for rehearing and brief in support thereof on March 20, 1941 (Orig. Rec. 449) and petition was denied April 14, 1941 (Orig. Rec. 485).

(4) Petitioner filed petition for writ of certiorari in this Court seeking a reversal of the decision of the Circuit Court of Appeals on both grounds and filed brief in support thereof. This petition was denied on October 13, 1941 (314 U. S. 629). Pursuant to this denial the Court of Appeals for the Seventh Circuit, on October 28, 1941,

issued a mandate to the District Court ordering the dismissal of the complaint. On December 8, 1941 the costs were taxed against the defendant in the sum of $655.35 and execution was issued therefor and returned unsatisfied, and these costs remain unpaid at this date. A final decree dismissing the bill with costs was entered in the District Court on July 15, 1942.

Petitioner then employed a new attorney, Joseph T. Harrington, who on December 3, 1942 entered an appearance in this cause (Supp. Rec. 11).* Thereafter the following occurred:

(5) Petitioner filed a petition with the Circuit Court of Appeals for permission to make application to the District Court for leave to file a bill of review and a brief in support thereof, on December 3, 1942 (Supp. Rec. 1). Respondent filed written answer to this petition on December 31, 1942 (Supp. Rec. 25) and on February 2, 1943 the Circuit Court of Appeals denied petitioner's petition (Supp. Rec. 43).

(6) Petitioner then filed with the Circuit Court of Appeals a motion to vacate the order of February 2, 1943 (Supp. Rec. 44) and this was denied on February 15, 1943 (Supp. Rec. 45).

Petitioner then employed new attorneys, Howard D. Moses and Charles G. Culver, who entered an appearance of record on August 4, 1943 (Supp. Rec. 45), and who are the attorneys presenting this petition. Thereafter the following occurred:

(7) Petitioner filed an amended petition for permission to make application to the District Court for leave to file a bill in the nature of a bill of review and a brief in support thereof on August 4, 1943 (Supp. Rec. 46).

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* Supp. Rec. refers to the transcript of record filed in this Court by petitioner on March 1, 1944.

(8) Respondent filed a motion and a supplemental motion for an order to strike Petitioner's Amended Petition (Supp. Rec. 101-103) and on December 1, 1943 the Circuit Court of Appeals denied Petitioner's Amended Petition (Supp. Rec. 105).

(9) Petitioner has now filed in this Court, on March 1, 1944, nineteen and one-half months after the final decree dismissing this complaint was filed in the District Court, a second petition for a writ of certiorari and brief in support thereof.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

This Court has previously refused to grant a writ of certiorari in this cause under date of October 13, 1941, at which time the petition for the writ of certiorari sought to bring to this Court the entire record, including the final decision of the Circuit Court of Appeals. Since this Court denied petitioner's original petition the Circuit Court of Appeals has issued its mandate ordering the District Court to dismiss the complaint, and the District Court on July 15, 1942 entered a final decree dismissing that complaint. Although the petitioner has made no attempt to review the final decree so entered, it has filed several pleadings with the Circuit Court which are comparable to a petition for rehearing, all of which have been denied. The denial by the Circuit Court of the last of these petitions is the basis upon which petitioner seeks a writ of certiorari from this Court.

Respondent suggests that this Court will not consider the granting of a writ of certiorari from the order of the Circuit Court denying petitioner's application for a rehearing because that is a matter addressed to the Circuit Court's

discretion. See *Conboy* v. *First National Bank of Jersey City* (203 U. S. 141; 51 L. Ed. 129). If respondent is correct in this contention then this present petition for writ of certiorari should not be entertained by this Court since it is not taken within three months from the date of any decree which is subject to review herein as required by Title 28, Section 350 of the United States Code, since the original decision of the Circuit Court of Appeals is dated March 6, 1941 and the order denying rehearing is dated April 14, 1941 and the final decree of the District Court dismissing the complaint was entered July 15, 1942, pursuant to the mandate of the Circuit Court of Appeals.

Even if this Court should consider this petition to be proper and timely, the specifications of errors and stated reasons for granting the writ are wholly inadequate under established precedents.

Argument.

The decision of the Circuit Court of Appeals was based upon two separate and independent grounds. The respondent, who was charged with infringing petitioners patents by having sold the alleged infringing machine, denied that the machine he sold infringed petitioner's patents. The Circuit Court held that by reason of the differences between the machine sold by respondent and the claims under petitioner's patents, that no infringement resulted.

The respondent also pled an affirmative defense that the manufacturer, the Addressograph-Multigraph Corporation, had the right to manufacture these machines under the provisions of a license agreement from the petitioner. The Circuit Court held that the manufacture of the machine was permitted under this license agreement.

Neither petitioner's Specifications of Errors (Peti-

tioner's Pet. 7) or its Reason Relied On for Allowance of the Writ (Petitioner's Pet. 6), challenge the Circuit Court's opinion that because of the difference in structures, the machine which respondent sold did not infringe the petitioner's patents. Under these circumstances this point is not before this court for consideration, and therefore since the decision on this point defeats the petitioner's action, the writ should be denied. In the body of petitioner's argument, however, there is a brief reference to why the Circuit Court would or should find that this sale was an infringement, so we will discuss this point briefly.

Point I.

There Is No Basis for Petitioner's Claim That Upon Retrial the Circuit Court Would Change Its Opinion and Find Infringement.

The petitioner admits that the machine sold by the respondent and the machine described in its patents differ in construction. The petitioner claims that if the Circuit Court had known that petitioner made these changes in the construction of the machine after the patents issued, then respondent would have been estopped from asserting this defense. The petitioner claims that the Circuit Court was prevented from knowing of this fact by the fraudulent conduct of its first attorneys in deleting from the record by stipulation blue prints which would have proven this fact (See Petitioner's Petition 3 and 19).

No such stipulation was made, nor were the blue prints deleted from the record as presented to the Circuit Court, and petitioner fails to point out where in the record any such stipulation or order of deletion is evidenced. The blue prints were included in the Designation of Record on appeal as physical exhibits (Orig. Rec. 223). They were

transmitted by the Clerk of the District Court to the Clerk of the Circuit Court (Orig. Rec. 440). They were considered by the Circuit Court as evidenced by the note in the court's opinion which said, "This opinion is written for the parties and their attorneys. Others seeking a complete copy of the two patents, the patents of the prior art, the drawings and the testimony, may find them in the office of the Clerk" (Orig. Rec. 448). The record does not sustain the petitioner's charge of fraud of his own counsel.

This entire matter was called to the attention of the Circuit Court and its action in refusing to reopen the case was clearly proper. No plea of estoppel was ever made in the original pleadings, nor could there be any legal or factual basis to support it. The agreements and transactions between the petitioner and the manufacturer could not raise an estoppel against this respondent who was not a party thereto, nor could petitioner extend his patent monopoly beyond the claims of his patents by any alleged estoppel. The Circuit Court held that because of difference in structures the machine which respondent sold did not infringe petitioner's patent and petitioner is not here contesting this ground of the decision. Petitioner cannot make this sale by respondent an infringement of petitioner's patent monopoly on any theory of estoppel.

Point II.

Petitioner Is Not Entitled to a Writ of Certiorari to Review the Refusal of the Circuit Court of Appeals to Reopen the Case for a Determination of the Correctness of Its Decision Relative to the License Agreement.

We feel that this question is academic in view of the obvious correctness of the court's decision that due to the differences in structures respondent's sale did not infringe petitioner's patent. This holding of non-infringe-

ment alone disposes of this case and fully supports the final decree dismissing the complaint entered July 15, 1942. However, as petitioner has devoted its entire showing to the construction of the license agreement, we will briefly discuss this point.

Petitioner's sole contention is that its first counsel refused to offer certain written testimony tending to establish the true intent of the license agreement and that such action on its counsel's part constitutes a fraud for which petitioner is entitled to try the case again on a different theory than originally presented. In the case of *United States* v. *Throckmorton* (98 U. S. 61, 66; 25 L. Ed. 93, 95), the court in discussing what action of counsel justified the reopening of a case said:

> "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—*these, and similar cases which show that there has never been a real contest in the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing." (Italics ours.)

The record contains no evidence of conduct of petitioner's counsel as above described, but the record does show that through the efforts of petitioner's first counsel, there was a "real contest in the trial" and in the Circuit Court of Appeals and before this court. Whether petitioner's first counsel knew of the written testimony at the time of the trial is a matter supported solely by petitioner's allegations attached as exhibits to its application to the Circuit Court of Appeals. We think that this court's attention should be directed to a letter written to the Circuit Court of Appeals by petitioner's first counsel, which reads as follows:

"THIESS, OLSON & MECKLENBURGER
Attorneys and Counsellors
77 West Washington Street
Chicago

August 13, 1943

The Honorable Evan A. Evans,
The Honorable J. Earl Major,
The Honorable Otto Kerner,
Judges of the Circuit Court of Appeals,
1212 Lake Shore Drive,
Chicago, Illinois.

GENTLEMEN:

There has recently come to our attention a document entitled 'Amended Petition of Plaintiff-Appellee for Permission to Make Application to the District Court for leave to File a Bill in the Nature of a Bill of Review and Suggestions in Support Thereof', filed in the case of *Jogger Manufacturing Corporation* v. *Wendell H. Roquemore, Doing Business as Multigraph Sales Agency,* Appeal No. 7274.

This document contains assertions reflecting upon the professional and personal integrity and conduct of Thorley von Holst, a member of our firm who has been associated with us in the practice of law for the last twenty years.

Should the Court contemplate taking any affirmative action on the assumption of the truth of these scurrilous statements, we respectfully ask that we, and Mr. von Holst, be given an opportunity, upon notice from this Court, to be heard on a motion presented to the Court, to strike all such averments as scandalous and impertinent, and as being utterly without foundation in fact.

Yours very truly,
THIESS, OLSON & MECKLENBURGER"

AFM:MS

It is difficult to see wherein petitioner could have been prejudiced in any way. In the District Court petitioner was successful without the evidence claimed to have been suppressed. In the Circuit Court of Appeals the evidence was submitted to the court in connection with the Amended Petition for Permission to Make Application To The District Court for Leave to File a Bill of Review. The Circuit Court after consideration of the evidence was still of the opinion that its decision was correct and denied petitioner's Amended Petition. The only objection left to petitioner is that the Circuit Court was in error in reaching this decision. A reading of this written testimony evidences at once that the manufacturer was demanding the very rights which the Circuit Court said were granted to it by the license agreement and that the petitioner was at first unwilling to grant these rights. This testimony we believe supports fully the Circuit Court's decision on this point.

The petitioner has recently filed in this court the affidavits of E. F. Koenig and W. C. Dunlap, and now moves that they be considered in conjunction with the record. These affidavits deal with the impressions, understandings and legal conclusions of the affiants as to matters that occurred thirteen years ago and do not purport to recite the facts by relating the conversations on which their conclusions are based. A comparison of the affidavits of these ex-employees of the manufacturer, with the letters produced by petitioner (Supp. Rec. 82-94) show that these affiants, like anyone else after thirteen years, have forgotten just what the negotiations actually encompassed. The final written license agreement on its face, clearly discloses that the manufacturer was granted broader rights than these affiants now recall as it specifically provides that the manufacturer may make these machines for attachment to its "products as from time to time manufactured" (Orig. Rec. 191).

Conclusion.

The petition presents no ground for the exercise of this Court's jurisdiction since this Court should not grant a writ of certiorari to review the action of the Circuit Court of Appeals in denying what is in effect a petition for rehearing.

The decision in the case is rested on the ground that there was no infringement of petitioner's patent because the machine sold by respondent differed from the machine described in the patents. This point was brought to this court by a prior petition for writ of certiorari which was denied. Pursuant to this denial a final decree was entered in the District Court more than nineteen and one-half months before the present petition was filed. Petitioner's claims at this time do not question the finding of non-infringement because of difference in structures. For this reason alone the writ should be denied.

The petitioner's challenge to the Circuit Court of Appeals' findings relative to the scope of the license agreement fails to state any recognized grounds for the exercise of the jurisdiction of this court. Petitioner's complaints have all been fully and carefully considered by the Circuit Court of Appeals on four occasions and have been rejected each time. Perseverance may be a commendable characteristic, but in the interests of the public there must come a time in all cases when the court will tell a litigant that he is through, even though he wants to try again. The petition should be denied.

Respectfully submitted,

PHILIP M. AITKEN,
402 Woodmen Accident Bldg.
Lincoln, Nebraska,
Counsel for Respondent.